

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, et al.)	
)	
Plaintiffs,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., et al.)	
)	
Defendants.)	
)	

**DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT
ON COUNTS 7 & 8 OF THE SECOND AMENDED COMPLAINT
AND INTEGRATED BRIEF IN SUPPORT**

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF UNDISPUTED MATERIAL FACTS	3
LEGAL STANDARD.....	10
ARGUMENT	11
I. PLAINTIFFS’ STATE STATUTORY CLAIMS APPLY ONLY TO CONDUCT OCCURRING IN OKLAHOMA	11
II. THE REGISTERED POULTRY FEEDING OPERATIONS ACT REGULATIONS AT ISSUE IN COUNT EIGHT DO NOT APPLY TO DEFENDANTS	11
III. EVEN UNDER PLAINTIFFS’ THEORY, DEFENDANTS HAVE NOT CAUSED THE VIOLATIONS ALLEGED IN COUNT 7 WITH REGARD TO POULTRY LITTER APPLIED BY FARMERS AND RANCHERS WHO ARE NOT GROWERS	15
IV. PLAINTIFFS’ CANNOT ESTABLISH REQUIRED ELEMENTS OF EACH STATUTORY CLAIM.....	16
A. Count 7: 27A O.S. § 2-6-105 and 2 O.S. §2-18.1	17
B. Count 8: Oklahoma Registered Poultry Feeding Operations Act (RPFO Act).....	22
1. The Land Application of Poultry Litter Does Not Result in the “Discharge” or “Runoff” of “Poultry Waste” or “Significant Pollutants”	23
2. The Land Application of Poultry Litter in Compliance With Oklahoma Law Cannot Constitute a Violation of the RPFO Act	24
V. PLAINTIFFS HAVE FAILED TO IDENTIFY ANY SPECIFIC RECORD EVIDENCE TO DEMONSTRATE THAT EACH DEFENDANT VIOLATED THE STATE STATUTORY CLAIMS.....	24
CONCLUSION.....	
EXHIBIT INDEX	Addendum A

TABLE OF AUTHORITIES

CASES

<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	10
<i>Attorney General of the State of Oklahoma v. Tyson Foods</i> , No. 08-5154, Slip Op. (10th Cir. May 13, 2009).....	17
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	10
<i>Champlin Refining Co. v. Corporation Comm. of State of Okla.</i> , 286 U.S. 210 (1932).....	22
<i>Connally v. General Constr. Co.</i> , 269 U.S. 385 (1926).....	22
<i>Crawford Fitting Co. v. J.T. Gibbons, Inc.</i> , 482 U.S. 437 (1987).....	19
<i>Crutchfield v. Marine Power Engine Co.</i> , ___ P.3d ___, 2009 WL 1204493 (Okla. May 5, 2009).	19
<i>Culp v. Sifers</i> , 550 F. Supp. 2d 1276 (D. Kan. 2008).....	10
<i>Eason Oil Co. v. Corp. Comm’n</i> , 535 P.2d 283 (Okla. 1975).....	19
<i>EEOC v. Comm’l Office Prods.</i> , 486 U.S. 107 (1988).....	19
<i>In re Estate of Jackson</i> , 194 P.3d 1269 (Okla. 2008).....	21
<i>In re Holt</i> , 932 P.2d 1130 (Okla. 1997).....	14, 19
<i>In re Protest of Betts Telecom Okla., Inc.</i> , 178 P.3d 197 (Okla. Civ. App. 2008).	20
<i>Kimbrough v. United States</i> , 128 S. Ct. 558 (2007).....	14

<i>Matsushita Elec. Indus. v. Zenith</i> , 475 U.S. 574 (1986).....	10
<i>Medellin v. Texas</i> , 128 S. Ct. 1346 (2008).....	13
<i>Okla. City Zoological Trust v. State</i> , 158 P.3d 461 (Okla. 2007).....	13
<i>Rout v. Crescent Pub. Works Auth.</i> , 878 P.2d 1045 (Okla. 1994).....	14
<i>Russell v. Chase Inv. Servs. Corp.</i> , ___ P.3d ___, 2009 WL 983541 (Okla. Apr. 7, 2009).	18, 19, 21
<i>Sierra Club v. Seaboard Farms</i> , 387 F.3d 1167 (10th Cir. 2004).	10, 25
<i>U.S. v. National Dairy Products Corp.</i> , 372 U.S. 29 (1963).....	22
<i>United States v. Am. Trucking Assns.</i> , 310 U.S. 534 (1940).....	19

STATE STATUTES

2 O.S. § 2-16 (2008).	1, 25
2 O.S. § 2-18.1 (2008).	15, 17
2 O.S. § 2-18.1(A) (2008).....	1, 17, 19
2 O.S. § 10-9.1 <i>et seq</i> (2008).	6, 7, 13
2 O.S. § 10-9.1(B)(8) (2008).	3, 12
2 O.S. § 10-9.1(B)(12) (2008).	12
2 O.S. § 10-9.1(B)(13) (2008).	3
2 O.S. § 10-9.1(B)(15) (2008).	12
2 O.S. § 10-9.1(B)(16) (2008).	12
2 O.S. § 10-9.1(B)(20) (2008).	12
2 O.S. § 10-9.1(B)(21) (2008).	2, 23

2 O.S. § 10-9.3 (2008).	7
2 O.S. § 10.9-4 (2008).	7
2 O.S. § 10-9.5(F) (2008).	13
2 O.S. § 10-9.5(F)(1) (2008).	7
2 O.S. § 10-9.5(G) (2008).	13
2 O.S. § 10-9.7 (2008).	1, 6, 7, 11
2 O.S. § 10-9.7(A) (2008).	1, 13
2 O.S. § 10-9.7(B)(1) (2008).	1, 22, 23
2 O.S. § 10-9.7(B)(4)(a) (2008).	1, 22, 24
2 O.S. § 10-9.7(B)(4)(b) (2008).	23, 24
2 O.S. § 10-9.7(C) (2008).	7
2 O.S. § 10-9.11 (2008).	2, 25
2 O.S. § 10.9-16, <i>et seq.</i> (2008).	6, 8
2 O.S. § 20-48 (2008).	6
2 O.S. § 20-62 (2008).	25
27A O.S. § 2-3-504 (2008).	1, 25
27A O.S. § 2-6-101 (2008).	20
27A O.S. § 2-6-102 (2008).	21
27A O.S. § 2-6-105 (2008).	15, 17
27A O.S. § 2-6-105(A) (2008).	1, 17, 18, 19
27A O.S. § 2-6-105(B) (2008).	20

RULES AND REGULATIONS

Fed. R. Civ. P. 56(c)	10
O.A.C. § 35:17-5 (1999).	11

O.A.C. § 35:17-5-1, <i>et seq.</i> (1999).	6, 7, 13
O.A.C. § 35:17-5-1 (1999).....	6, 21
O.A.C. § 35:17-5-2 (1999).....	2, 3, 23
O.A.C. § 35:17-5-3(b)(1)-(7) (1999).	13
O.A.C. § 35:17-5-5 (1999).....	1
O.A.C. § 35:17-5-5(a)(7)(C) (1999).	1, 22, 23
O.A.C. § 35:17-5-5(c) (1999).	2 22, 24
O.A.C. § 35-17-7-1 <i>et seq.</i> (1999).	6, 8

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV	21
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INTRODUCTION

Defendants respectfully move for summary judgment on Counts 7 and 8 of the Second Amended Complaint, Dkt. #1215 (July 16, 2007) (“SAC”). In these counts, Plaintiffs allege that Defendants violated various Oklahoma rules generally prohibiting pollution and specifically regulating the application of poultry litter.¹ These claims should be dismissed as a matter of law for several reasons.

¹ **Count 7** alleges violations of the following statutory provisions:

- 27A O.S. § 2-6-105(A): “It shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state.”
- 2 O.S. § 2-18.1(A): “It shall be unlawful and a violation of the Oklahoma Agricultural Code for any person to cause pollution of any waters of the state by persons which are subject to the jurisdiction of the Oklahoma Department of Agriculture, Food, and Forestry pursuant to the Oklahoma Environmental Quality Act.”

See SAC ¶¶128-30. Plaintiffs request relief for these alleged violations pursuant to 27A O.S. § 2-3-504 and 2 O.S. § 2-16, respectively. *See* SAC ¶131.

Count 8 alleges violations of the following provisions and administrative rules enacted pursuant to the Oklahoma Registered Poultry Feeding Operations Act (“RPFO Act”):

- 2 O.S. § 10-9.7. Utilization of best management practices--Animal waste management plans--Soil testing--Carcass disposal plan:
 - 2 O.S. § 10-9.7(A): “All poultry feeding operations shall utilize Best Management Practices and shall meet the conditions and requirements established by subsection B of this section and by rules promulgated by the State Board of Agriculture pursuant to the Oklahoma Registered Poultry Feeding Operations Act.”
 - 2 O.S. § 10-9.7(B)(1): “There shall be no discharge of poultry waste to waters of the state.”
 - 2 O.S. § 10-9.7(B)(4)(a), (b): “Poultry waste handling, treatment, management and removal shall: (a) not create an environmental or a public health hazard, [and] (b) not result in the contamination of waters of the state.”
- O.A.C. § 35:17-5-5. Registered Poultry Feeding Operations--Animal Waste Management Plan requirements:
 - O.A.C. § 35:17-5-5(a)(7)(C): “Poultry waste shall only be applied to suitable land at appropriate times and rates as specified by the AWMP. Runoff of poultry waste from the application site is prohibited.”

First, Defendants cannot have violated the statutory and regulatory provisions in Count 8 because Defendants are not subject to those provisions. The Registered Poultry Feeding Operations Act (“RPFO Act”) plainly states that the regulations upon which Plaintiffs rely apply *only* to “poultry feeding operations,” and the owners and operators thereof—not to Defendants.

Second, Defendants cannot be held liable in Count 7 for violations alleged to have been caused by the application of poultry litter by non-party farmers and ranchers (who are not Growers) who obtain poultry litter on the open-market and have no relationship with Defendants.

Third, Plaintiffs cannot demonstrate necessary elements of the claims alleged in Counts 7 and 8. For example, Plaintiffs cannot substantiate their allegation that Defendants caused a “discharge” as that term is defined in the RPFO Act. *See* SAC ¶133. The Act requires a “release by pumping, pouring, emptying, or dumping of poultry waste *directly or through a manmade conveyance* into waters of the State.” O.A.C. § 35:17-5-2 (emphasis added).² There is no allegation or evidence of such direct discharges in this case. Rather, Plaintiffs’ claims are based entirely on the allegation that precipitation may cause runoff of nutrients and bacteria from fields where poultry litter has previously been applied as a fertilizer. Accordingly, the laws prohibiting direct dumping into the waters of the state have no application here.

Finally, Plaintiffs have failed to generate specific record evidence to substantiate each alleged violation of these state statutory provisions, as required by law.

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- O.A.C. § 35:17-5-5(c): “Storage and land application of poultry waste shall not cause a discharge or runoff of significant pollutants to waters of the State or cause a water quality violation to waters of the State.”

See SAC ¶¶133-34. Plaintiffs request relief for these alleged violations pursuant to 2 O.S. § 10-9.11. *See* SAC ¶135.

² *See also* 2 O.S. § 10-9.1(B)(21) (“‘Poultry waste’ means poultry excrement, poultry carcasses, feed wastes or any other waste associated with the confinement of poultry from a poultry feeding operation”).

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. The Illinois River Watershed (“IRW”) comprises approximately 1,069,530 acres, located half in Oklahoma (approximately 576,030 acres), and half in Arkansas (approximately 493,500 acres). *See* SAC ¶21; SAC Ex. 1. The IRW encompasses portions of seven counties (three in Arkansas and four in Oklahoma) as well as at least thirteen cities and towns. *See id.*

2. Poultry growers (“Contract Growers” or “Growers”) are independent farmers and ranchers who contract with Defendants to raise poultry. *See* Ex. 1 at 2049:8-10 (“Preliminary Injunction Transcript” or “P.I.T.”); Exs. 2-7.

3. Plaintiffs have not made any Contract Grower a party to this case. *See* SAC ¶¶5-20. Instead, all of the Defendants in this action are poultry integrators (“Defendants” or “poultry integrator Defendants”). *See id.* An integrator is “an entity which unites the elements associated with the poultry industry, including but not limited to hatching, feeding, processing and marketing,” and is distinct under Oklahoma’s poultry litter laws from a Grower. 2 O.S. §§ 10-9.1(B)(8), (13).

4. The poultry integrator Defendants furnish Contract Growers with the poultry (chicks), and supply feed, medication and other technical support during the growing process. *See* Exs. 2-7; *see, e.g.*, Ex. 2 at TSN22977SOK ¶¶1(A)-(C); Ex. 5 at SIM AG 37096 ¶¶2(a)-(c).

5. Poultry are raised in the IRW in houses or barns owned by Contract Growers. *See* P.I.T. at 2030:7-15 (Ex. 1); Anderson Dep. at 203:12-24 (Ex. 8); Exs. 2-7; *see, e.g.*, Ex. 2 at TSN22977SOK ¶2(A); Ex. 5 at SIM AG 37096 ¶3(b).

6. Growers typically purchase the bedding material—usually consisting of rice hulls or wood shavings—to place inside the poultry houses or barns to provide a soft and absorbent material on which to raise poultry. *See* P.I.T. at 2033:2-8 (Ex. 1); Exs. 2-7; *see, e.g.*, Ex. 2 at

TSN22977SOK ¶2(A); Ex. 5 at SIM AG 37096 ¶3(b); *see also* Ex. 9.

7. “Poultry litter consists of fecal excrement and ... bedding material ... and other components such as feathers and soil. Wood shavings, sawdust, and soybean, peanut, or rice hulls are all common” bedding materials. Ex. 9.

8. Growers, not Defendants, decide when to clean out poultry litter from their poultry houses or barns. *See* P.I.T. at 2031:20-23, 2032:9-11 (Ex. 2-7).

9. Growers, not Defendants, own the poultry litter generated on their farms. *See* P.I.T. at 2045:6-18, 2048:14-2049:6 (Ex. 1); Ex. 10 at Pigeon Aff. ¶¶6, 7, Reed Aff. ¶¶7, 8, 11, Saunders Aff. ¶¶5, 6; Exs. 2-7; *see, e.g.*, Ex. 4 at PFIRWP-024054 ¶II(H); Ex. 5 at SIM AG 37099 ¶7.

10. Growers sell, distribute, store or use their poultry litter at their own discretion, subject to applicable state laws and regulations. *See* P.I.T. at 2024:25-2025:15, 2031:24-25, 2032:12-25, 2045:6-2046:9, 2052:21-2053:14 (Ex. 1); Littlefield Dep. at 53:2-9 (Ex. 11); Ex. 10 at Pigeon Aff. ¶¶6, 7, Reed Aff. ¶¶7, 8, Saunders Aff. ¶¶5, 6.

11. If a Grower decides to apply poultry litter as a fertilizer to the Grower’s own farm or pasture land, the Grower, not Defendants, determines the time, method, location, and amount of poultry litter to be applied, subject to applicable state laws and regulations. *See* Littlefield Dep. at 53:2-9 (Ex. 11); P.I.T. at 2031:24-25, 2032:12-15, 2045:24-2046:9 (Ex. 1); Ex. 10 at Pigeon Aff. ¶¶6, 7, Reed Aff. ¶¶7, 8, Saunders Aff. ¶¶5, 6; *see also* Undisputed Facts ¶¶18-19.

12. If a Grower decides to sell or distribute poultry litter that is removed from the Grower’s poultry houses or barns, the Grower, not Defendants, determines the buyer, timing, quantity and price for the transaction. *See* P.I.T. at 2024:25-2025:15, 2032:16-19, 2032:22-25, 2045:20-23, 2052:21-2053:14 (Ex. 1); Ex. 10 at Pigeon Aff. ¶¶6, 7, Reed Aff. ¶8, Saunders Aff.

¶6.

13. If a Grower sells or distributes poultry litter, the Grower, not Defendants, receives and retains the proceeds from the sale or distribution. *See* Fisher I Dep. at 317:13-20 (Ex. 12); P.I.T. at 2052:21-2053:14 (Ex. 1); Ex. 10 at Pigeon Aff. ¶6, Reed Aff. ¶11.

14. The contracts entered into between the Growers and the poultry integrator Defendants do not infringe on the Growers' ownership and use of poultry litter, with the exception of provision(s) requiring Growers to comply with all federal, state and local laws and regulations related to the sale, distribution, storage, management or use of poultry litter. *See* Exs. 2-7; *see, e.g.*, Ex. 2 at TSN22977SOK – TSN22978SOK ¶¶2(F), 2(H), 11(G); Ex. 3 at GE 41403 ¶V(A); Ex. 4 at PFIRWP-024052 – PFIRWP-024062 ¶¶II(F), III(A)(9)-(11), VI(A)-(G); Ex. 5 at SIM AG 37096 ¶3(o); Ex. 6 at CM-000001372 ¶3; Ex. 7 at CARTP172228 ¶7.

15. Approximately one-half of all poultry litter used as fertilizer in the IRW is land-applied by non-party farmers and ranchers who are not poultry Growers, but who purchase or obtain the litter from Growers or other sources (not Defendants). *See* Exs. 13-14.

16. Poultry litter is a widely utilized fertilizer, which provides soil nutrients, increases crop yields and outperforms commercial fertilizers. *See, e.g.*, Ex. 15 at 1, 2 (“Poultry Litter is an excellent, low cost fertilizer [that] returns nutrients and organic matter to the soil, building soil fertility and quality.”); Ex. 16 at 1 (“Applying animal manure to farmland is an appropriate and environmentally sound management practice [that] recycle[s] nutrients from manure to soil for plant growth and add organic matter to improve soil structure, tilth, and water holding capacity.”); Ex. 9 (“[Poultry] litter can be utilized as a fertilizer for pastureland, cropland and hay production [and is] an excellent source of ... nitrogen, phosphorus and potassium. In addition, litter returns organic matter and other nutrients to the soil, which builds soil fertility and

quality.”); Ex. 1 at 31:11-14, 540:19-541:4, 1764:23-1768:9 (“P.I.T.”); Peach Dep. at 45:7-10, 126:22-128:9, 136:17-137:24 (Ex. 17); Ex. 18 at 7-8.

17. Oklahoma and its agents recognize poultry litter as an effective fertilizer, and actively encourage and approve of its use. *See, e.g.*, 2 O.S. § 10-9.1, *et seq.*; O.A.C. § 35:17-5-1 (enacting poultry litter laws and regulations to “assist in ensuring beneficial use of poultry waste”); Ex. 19 (“The Oklahoma Litter Market website serves as a communication link for buyers, sellers and service providers of poultry litter.”); Ex. 20 (providing a “Fertilizer Value Calculator” to “calculate [the] value of nutrients in [poultry] litter”); Peach Dep. at 79:3-9 (“Oklahoma Conservation Commission teach[es] people how to ... apply ... and use litter in the IRW”) (Ex. 17); Undisputed Facts ¶16 (citing statements by agents of Oklahoma).

18. Oklahoma authorizes and comprehensively regulates the land application of poultry litter. *See* 2 O.S. § 10-9.1 *et seq.*; 2 O.S. § 10-9.16 *et seq.*; O.A.C. § 35:17-5-1 *et seq.*; O.A.C. § 35-17-7-1 *et seq.*

19. Every application of poultry litter to land in the Oklahoma portion of the IRW must be performed by a registered poultry farmer (*i.e.*, Grower) or certified applicator consistent with an animal waste management plan (“AWMP”) or nutrient management plan (“NMP”) approved by the State of Oklahoma. The State-approved poultry litter management plans are specifically tailored to the each parcel of land and dictate the time, method, location and amount of poultry litter that may be applied. *See* 2 O.S. §§ 10-9.7, 20-48; 2 O.S. § 10-9-16 *et seq.*; O.A.C. § 35:17-5-1 *et seq.*; O.A.C. § 35-17-7-1 *et seq.*; *see, e.g.*, Exs. 21-26; *see also, e.g.*, Parrish Dep. at 71:4-79:20, 235:21-236:3 (Ex. 27); Gunter Dep. at 74:6-12 (Ex. 28); Fisher II Dep. at 470:8-471:8, 472:15-473:7 (Ex. 29).

20. With one exception, the statutory regulations and duties imposed by the provisions of the RPFO Act alleged in Count 8 have been applied by the State of Oklahoma *only* with respect to “poultry feeding operations,” and the owners and operators thereof (*i.e.* Growers). *See, e.g.*, Gunter Dep. at 78:8-80:18; 152:8-157:1 (affirming that the “regulated community” under Oklahoma’s poultry litter statutes and regulations are the Growers, not the poultry integrator Defendants) (Ex. 28); Peach Dep. at 117:8-24, 120:12-122:9 (ODAFF only has jurisdiction to, and in fact does only, regulate the Growers and farms—not Integrators) (Ex. 17); Parrish Dep. at 201:2-202:3 (“[ODAFF’s] practice is compliance issues pertaining to registered poultry operations. ... [In the event of] a violation at that facility ... ODAFF looks to that poultry grower to pay that penalty, not the integrator with whom they contract.”) (Ex. 27); Littlefield Dep. at 20:20-24:22, 32:7-38:6 (Ex. 11); *see generally* 2 O.S. § 10-9.1 *et seq.*; O.A.C. § 35:17-5-1 *et seq.*; *see also, e.g.*, 2 O.S. §§ 10-9.3, 9-4 (annual registration of poultry farms); 2 O.S. § 10-9.5(F)(1) (mandatory course on poultry litter management for Growers); 2 O.S. § 10-9.7(C) (nutrient management plan required for Growers); 2 O.S. § 10-9.7 (mandatory education required for Growers).

21. The only provision of the RPFO Act that the State of Oklahoma has applied to Defendants is the statutory requirement that poultry integrators may not contract with any Grower who has not completed the State’s required program to educate Growers on the appropriate use of their litter. *See* Gunter Dep. at 154:9-157:1 (Ex. 28); 2 O.S. § 10-9.5.G.

22. There is no record evidence that any poultry integrator has ever been subject to an enforcement action under the statutory provisions and administrative rules of the RPFO Act alleged in Count 8. *See* Peach Dep. at 37:15-39:4, 75:17-76:10, 96:4-11 (Ex. 17).

23. The statutory regulations and duties imposed under the remaining provisions of Oklahoma's poultry litter laws have been applied by the State of Oklahoma *only* with respect to the non-party farmers and ranchers (other than poultry Growers) who apply poultry litter to land, not the Defendant poultry integrators. *See* Gunter Dep. at 78:8-80:18; 152:8-157:1; *see generally* 2 O.S. § 10-9.16 *et seq.* (Oklahoma Poultry Waste Applicators Certification Act); O.A.C. § 35-17-7-1 *et seq.* (same).

24. Poultry litter is applied in the Oklahoma-portion of the IRW consistent with Oklahoma law. *See, e.g.,* Peach Dep. at 37:15-39:4, 75:2-76:10, 90:3-12, 92:25-93:6, 95:20-96:11, 114:14-117:7 (Ex. 17); Thompson Dep. at 16:15-22:25, 31:7-23, 42:13-43:7 (Ex. 30); Strong Dep. at 171:21-173:18 (Ex. 31); Fisher I Dep. at 146:22-149:1 (Ex. 12); Fisher II Dep. at 473:15-23 (Ex. 29); Tolbert Dep. at 160:4-164:17 (Ex. 32); P.I.T. at 2002:6-2003:5, 2005:7-16, 2006:12-15 (Ex. 1); Littlefield Dep. at 23:19-21, 43:3-15 (Ex. 11); Phillips Dep. at 63:18-23 (Ex. 33); Traylor Dep. at 11:16-12:11 (Ex. 34); *see also, e.g.,* Exs. 21-26.

25. Plaintiffs have not identified record evidence demonstrating that Defendants or non-party farmers and ranchers have applied poultry litter in a manner contrary to the specific instructions provided by Oklahoma under its comprehensive poultry litter regulations. *See* Fisher I Dep. at 146:22-149:1 (in four years of investigation in the IRW, Plaintiffs' field investigators failed to document any violations of state litter laws) (Ex. 12); Peach Dep. at 37:15-39:4, 75:17-76:10, 90:3-12, 96:4-11, 114:14-117:7 (Oklahoma Secretary and Commissioner of Agriculture is not aware of any violation by Defendants or Growers) (Ex. 17); Fisher II Dep. at 473:15-23 (not aware of any application in violation of state-approved NMP or AWMP) (Ex. 29); *see also* Undisputed Facts ¶¶22, 24.

26. Plaintiffs have not identified record evidence demonstrating that Growers have

applied poultry litter in a manner contrary to the specific instructions provided by Oklahoma under its comprehensive poultry litter regulations. *See* Fisher I Dep. at 146:22-149:1 (in four years of investigation in the IRW, Plaintiffs' field investigators failed to document any violations of state litter laws) (Ex. 12); Peach Dep. at 37:15-39:4, 75:17-76:10, 90:3-12, 96:4-11, 114:14-117:7 (Oklahoma Secretary and Commissioner of Agriculture is not aware of any violation by Defendants or Growers) (Ex. 17); Fisher II Dep. at 473:15-23 (not aware of any application in violation of state-approved NMP or AWMP) (Ex. 29); *see also* Undisputed Facts ¶24.

27. Plaintiffs have not identified record evidence of any specific application of poultry litter that they allege violated the statutory provisions and administrative rules alleged in Counts 7 and 8—including, but not limited to, identification of the date, location, amounts or responsible person(s) for each such application. *See* Undisputed Facts ¶¶26-27; Ex. 35 at Nos. 5-8; Ex. 36 at Nos. 5-8; Ex. 37 at Nos. 5-8.

28. There is no record evidence of any release of poultry litter or its component parts (including, but not limited to, poultry excrement, poultry carcasses, feed wastes or any waste associated with the confinement of poultry from a poultry feeding operation) by pumping, pouring, emptying, or dumping of poultry litter directly or through a manmade conveyance into waters of the State of Oklahoma.

29. There is no record evidence that the land application of poultry litter, performed in accordance with Oklahoma laws and regulations, results in the runoff, migration or release of poultry litter or its component parts (including, but not limited to, poultry excrement, poultry carcasses, feed wastes or any waste associated with the confinement of poultry from a poultry feeding operation) from the land application site.

30. On May 12, 2009, the Court granted Plaintiffs' Unopposed Motion to Dismiss with Prejudice Count 9 of Plaintiffs' Second Amended Complaint, Dkt. No. 2041 (May 12, 2009), and ordered dismissal of Count 9 of the SAC. *See* Order, Dkt. No. 2042 (May 12, 2009).

LEGAL STANDARD

"Summary judgment ... is an important procedure 'designed to secure the just, speedy and inexpensive determination of every action.'" *Culp v. Sifers*, 550 F. Supp. 2d 1276, 1281 (D. Kan. 2008) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). Summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party is entitled to summary judgment as a matter of law where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Where the movant shows the "absence of a genuine issue of material fact, the non-movant may not rest on its pleadings but must set forth specific facts showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." *Sierra Club v. Seaboard Farms*, 387 F.3d 1167, 1169 (10th Cir. 2004); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (requiring non-moving party to provide admissible evidence "on which a jury could reasonably find for the plaintiff"); *Matsushita Elec. Indus. v. Zenith*, 475 U.S. 574, 586 (1986) ("[plaintiff] must do more than simply show that there is some metaphysical doubt as to the material facts"). Sufficiency of the evidence will turn on whether it presents a "disagreement [that] require[s] submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

ARGUMENT

I. PLAINTIFFS' STATE STATUTORY CLAIMS APPLY ONLY TO CONDUCT OCCURRING IN OKLAHOMA

This Court has dismissed Plaintiffs' state statutory claims in Counts 7, 8 and 9 as applied extraterritorially to Defendants' conduct in Arkansas.³ Notwithstanding this ruling, Count 7 of Plaintiffs' Second Amended Complaint was not amended to limit its application to conduct in Oklahoma. *See* SAC ¶¶127-31. For the reasons set forth in this Court's previous Order and the parties' filings on the extraterritorial issue, Plaintiffs' attempt to apply the state statutory claims to conduct taking place in Arkansas should be rejected as a matter of law.

II. THE REGISTERED POULTRY FEEDING OPERATIONS ACT REGULATIONS AT ISSUE IN COUNT 8 DO NOT APPLY TO DEFENDANTS

Count 8 alleges that Defendants violated certain specified provisions of the RPFO Act set forth in 2 O.S. § 10-9.7 ("Utilization of best management practices--Animal waste management plans..."), and O.A.C. § 35:17-5 ("Animal Waste Management Plan requirements").⁴ However, on their face these laws and regulations plainly apply only to "poultry feeding operations," and the owners and operators thereof (*i.e.* Growers)—not Defendants. Accordingly, Count 8 must be dismissed as a matter of law because Defendants are not subject to, and therefore cannot have violated, the applicable provisions or administrative rules.

The RPFO Act expressly distinguishes "poultry feeding operations," and the owners and operators thereof (*i.e.* Growers), from Defendants, which the Act refers to as "Integrators." Specifically, an "Integrator" under the RPFO Act is:

³ *See* June 15, 2007 Hearing Tr. at 16:22-17:14, 44:17-45:7 (granting Dkt. Nos. 66 & 75 motions to dismiss extraterritorial application of state statutory claims) (Ex. 38); Dkt. No. 1187; Dkt. No. 1202; *see also* Dkt. No. 129 at 23-24, 24 n.17 (Plaintiffs' concession as to Counts 8 and 9, and Count 7 in part); June 15, 2007 Hearing Tr. at 99:3-4 (same) (Ex. 38).

⁴ *See* SAC ¶¶132-35; Ex. 35 at No. 5. The full text of the relevant provisions of each statute is *supra* at 1 n.1.

an entity which unites the elements associated with the poultry industry, including but not limited to hatching, feeding, processing and marketing. It includes, but is not limited to, situations when growing is contracted out to others and when the integrator operates its own growing facilities.

2 O.S. § 10-9.1(B)(13). In contrast, the RPFO Act defines a “Poultry feeding operation” as:

a property or facility where the following conditions are met: (a) poultry have been, are or will be confined and fed or maintained for a total of forty-five (45) days or more in any twelve-month period, (b) crops, vegetation, forage growth or post-harvest residues are not sustained in the normal growing season over any portion of the property or facility, and (c) producing over ten (10) tons of poultry waste per year.

2 O.S. § 10-9.1(B)(20).⁵ Finally, the RPFO Act broadly defines the term “Person” to comprise

an individual, association, partnership, firm, company, public trust, corporation, joint stock company, trust estate, any other legal entity, or any agent, employee, representative assignor or successor thereof.

2 O.S. § 10-9.1(B)(16).

Applying these definitions, the statutory provisions invoked in Count 8 plainly apply only to “poultry feeding operations,” and the owners and operators thereof (*i.e.* Growers)—not to “Integrator” Defendants. First, the requirements regarding best management practices and animal waste management plans apply on their face only to “poultry feeding operations.” As the statutory text states:

⁵ The RPFO Act also defines, in relevant part, the following terms in conjunction with its definition of “poultry feeding operations”:

‘Contract poultry grower’ means any person engaged in the business of caring for or raising poultry, under a contract growing arrangement; [...]

‘Facility’ means any place, site or location or part thereof where poultry are kept, handled, housed or otherwise maintained including but not limited to buildings, lots, pens and poultry waste management systems; [...]

‘Operator’ means the person who performs the daily management functions associated with the poultry feeding operation.

2 O.S. § 10-9.1(B)(8), (12), (15). As defined by the RPFO Act, an “Integrator” may constitute the “Operator” of a “poultry feeding operation” only where “the integrator operates its own growing facilities.” 2 O.S. § 10-9.1(B)(13).

All poultry feeding operations shall utilize Best Management Practices and shall meet the conditions and requirements established by subsection B of this section and by rules promulgated by the State Board of Agriculture pursuant to the Oklahoma Registered Poultry Feeding Operations Act.

2 O.S. § 10-9.7(A) (emphasis added). Similarly, the “[AWMP] requirements” listed in O.A.C. § 35:17-5-1, *et seq.* require “[e]very poultry feeding operation” and the owners and operators thereof to obtain, and operate in compliance with, an AWMP. O.A.C. § 35:17-5-3(b)(1)-(7)); *see generally* O.A.C. § 35:17-5-1, *et seq.* But for a single exception, discussed below, the RPFO Act uniformly regulates the owner(s) and operator(s) of poultry feeding operations, not Defendants. *See* Undisputed Facts ¶¶20-21; *see generally* 2 O.S. § 10-9.1, *et seq.*; O.A.C. § 35:17-5-1, *et seq.*

The regulation of only “poultry feeding operations” in these provisions was no mere oversight, as it is clear that the Oklahoma Legislature knows full well how to impose requirements on Defendant “Integrators” when it wants to. Indeed, the RPFO Act expressly places one obligation on Integrators. 2 O.S. § 10-9.5(G) states that “[n]o integrator shall enter into any contract with an operator of a poultry feeding operation who is not in compliance with” the mandatory education requirements set forth in 2 O.S. § 10-9.5(F), which require Growers to take State-approved educational courses in how to properly handle and apply their litter.

The legislature could have included similar language in the other provisions that Plaintiffs now invoke, but it elected not to. It is black letter law that statutes should be construed as to give each term meaning and effect. *See Okla. City Zoological Trust v. State*, 158 P.3d 461, 464 (Okla. 2007). Plaintiffs’ attempt to apply the provisions of the RPFO Act would violate that rule, as it vitiates the law’s specific reference to “Integrators” and each of the aforementioned provisions’ explicit reference to poultry feeding operations. Accordingly, it is clear that the RPFO Act’s requirements apply to Growers and not the poultry integrator Defendants. *See Medellin v. Texas*, 128 S. Ct. 1346, 1366 (2008) (plain text demonstrates that legislature knows

how to reach a desired result when it wants to); *Kimbrough v. United States*, 128 S. Ct. 558, 571 (2007) (inappropriate to draw meaning from statutory silence when other statutory language indicates legislature’s ability to impose obligation directly); *see also In re Holt*, 932 P.2d 1130, 1134-35 (Okla. 1997) (“[T]he entire statute must be read as a whole, and the meaning given to one section should be determined by considering the other sections.”); *Rout v. Crescent Pub. Works Auth.*, 878 P.2d 1045, 1050 (Okla. 1994) (same).

The State’s enforcement practice confirms that these provisions apply only to Growers, not Defendants. Testifying on behalf of Plaintiffs as a 30(b)(6) witness, Counsel for the Oklahoma Department of Agriculture, Food, and Forestry (“ODAFF”)⁶ confirmed that (with the one exception discussed *supra*), the RPFO Act regulations apply *only* to the owners and operators of the poultry feeding operations—not the poultry integrator Defendants. *See* Gunter Dep. at 152:8-157:1 (Ex. 28). Oklahoma Secretary and Commissioner of Agriculture Terry Peach likewise testified that ODAFF’s jurisdiction under the RPFO Act is limited to regulation of only Growers, not poultry integrator Defendants. *See* Peach Dep. at 117:8-19, 121:23-25; 122:4-9 (ODAFF has no jurisdiction over a poultry integrator, unless it owns and operates a farm of its own) (Ex. 17); *id.* at 117:20-24 (where a poultry grower contracts with a poultry integrator, ODAFF only “regulate[s] the grower”); *id.* at 37:15-38:8 (RPFO Act does not provide for enforcement actions against an “industry grouping”). Further, the Director of ODAFF’s Agricultural Environmental Management Services division affirmed that ODAFF’s enforcement powers are limited to “compliance issues pertaining to registered poultry operations,” and that in the event of a violation, “ODAFF looks to that poultry grower to pay that penalty, not the integrator with whom they contract.” Parrish Dep. at 201:2-202:3 (Ex. 27). Accordingly,

⁶ ODAFF is Plaintiffs’ governing client on this matter, as “[ODAFF] represents the state of Oklahoma with regard to the matters relating to chicken litter.” Peach Dep. at 66:14-18 (Ex. 17).

despite the fact that poultry litter has been used as a fertilizer in the IRW for decades, no integrator has ever been subject to an enforcement action under the provisions at issue. *See* Undisputed Facts ¶¶22; *see also* Strong Dep. at 173:19-174:13 (Secretary of the Environment has not performed any investigation with respect to Plaintiffs' allegations that Defendants have violated the RPFO Act) (Ex. 31).

III. EVEN UNDER PLAINTIFFS' THEORY, DEFENDANTS HAVE NOT CAUSED THE VIOLATIONS ALLEGED IN COUNT 7 WITH REGARD TO POULTRY LITTER APPLIED BY FARMERS AND RANCHERS WHO ARE NOT GROWERS

Count 7 asserts violations of two general anti-pollution statutes, which impose liability on person(s) that "cause pollution" or "place or cause to be placed any wastes in a location where they are likely to cause pollution." 27A O.S. § 2-6-105; 2 O.S. § 2-18.1. Plaintiffs contend that Defendants have violated these statutory provisions as a result of pollution purportedly caused by the land application of poultry litter as a fertilizer in the IRW. *See* SAC ¶¶47-68, 127-31. But, Plaintiffs do not allege—let alone identify any evidence to prove—that Defendants actually own the poultry litter, or in any way control or participate in its application to land in the IRW. *See id.*; Undisputed Facts ¶¶4-14. Instead, Plaintiffs claim that Defendants are liable for the alleged pollution because they "dominat[e] and control" the Growers with whom they contract to raise poultry and that those Growers "place or cause to be placed any wastes in a location where they are likely to cause pollution." 27A O.S. § 2-6-105; 2 O.S. § 2-18.1; SAC ¶¶31-46 (alleging "domination and control" of "each stage of the [] growing process").

However, even if these factual allegations were true (which they are not), Plaintiffs do not allege that Defendants control the many non-party farmers and ranchers who do not contract with Defendants, but who purchase litter on the open-market to fertilize their cattle operations or other crops. *See* SAC ¶¶31-46; Undisputed Facts ¶¶15. As noted above, Oklahoma helps sponsor the ongoing marketplace for poultry litter in the IRW and cannot deny that it exists. *See*

Undisputed Facts ¶17; *see also* Ex. 19. Moreover, even if Plaintiffs argue about the exact amounts, Plaintiffs cannot deny that much of the poultry litter used in the IRW is land-applied by the non-party farmers and ranchers who have no relationship with Defendants. *See* Undisputed Facts ¶15. These non-Grower farmers and ranchers make their own decisions about where to “place or cause to be placed” the litter that they have purchased, and since they are not in privity with Defendants, those actions cannot be attributed to Defendants even under Plaintiffs’ unsubstantiated allegations that Defendants “control” the Growers.

Because Plaintiffs’ statutory claims are based in substantial part on actions that cannot be attributed, in any way, to Defendants, the Court should grant partial summary judgment on Count 7 as it relates to the actions of non-Growers.⁷

IV. PLAINTIFFS CANNOT ESTABLISH REQUIRED ELEMENTS OF EACH STATUTORY CLAIM

Counts 7 and 8 should also be dismissed because Plaintiffs cannot demonstrate necessary elements of each statutory provision that is alleged to have been violated. In Counts 7 and 8, Plaintiffs contend that the application of poultry litter violates general anti-pollution laws as a result of alleged runoff of constituent nutrients and bacteria into the waters of the State.⁸ Importantly, Plaintiffs have repeatedly alleged that *each and every* application of poultry litter results in pollution, even where applied in conformance with State-approved plans and regulations. Plaintiffs base this claim on their allegation that each and every application of poultry litter results in the release of phosphorous and bacteria into the IRW.⁹

⁷ The RPFO Act provisions and administrative rules alleged in Count 8 are not applicable to Defendants. *See supra* at 11-15. Notwithstanding this fact, partial summary judgment on Count 8 would be appropriate for these same reasons.

⁸ *See* SAC ¶¶47-68, 127-31.

⁹ *See, e.g.*, Dkt. No. 1917 at 8 (arguing that every litter application causes environmental damages); Ex. 39 at No. 9 (alleging that “each poultry grower operation ... is a source of

Although Defendants dispute the factual predicate underlying Plaintiffs' contention,¹⁰ this dispute is immaterial to the Court's summary judgment analysis because Plaintiffs could not satisfy the basic statutory requirements in Counts 7 and 8 even if the allegations were true. Moreover, any proposed interpretation of the statutory provisions to the contrary must be rejected, as the application of poultry litter pursuant to and in compliance with the specific rules set forth in Oklahoma's poultry litter laws cannot constitute a violation of general provisions of those same laws.

A. Count 7: 27A O.S. § 2-6-105 and 2 O.S. § 2-18.1

In order to prevail under Count 7, Plaintiffs must demonstrate that Defendants have:

- (i) "cause[d] pollution of any waters of the state," 27A O.S. § 2-6-105(A); 2 O.S. § 2-18.1(A); or
- (ii) "place[d] or cause[d] to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state," 27A O.S. § 2-6-105(A). Here, Plaintiffs argue that each and every application of poultry litter in the IRW violates these provisions because it introduces phosphorous and bacteria to the IRW, and places them in a location where they may reach the waters of the State. *See supra* at 16-17 n.9. However, Oklahoma law expressly authorizes farmers and ranchers to apply poultry litter in the IRW. *See Undisputed Facts* ¶¶18-19. Indeed, this regulatory scheme regulates every aspect of the activity, dictating who may

contamination"); Ex. 40 at No. 7 (describing the undifferentiated application of litter as a CERCLA release); Ex. 41 at 2 Nos. 2-3 (describing every application of poultry litter in the IRW as a release or threatened release); Thralls Dep. at 82:14-84:18 (Plaintiffs' counsel confirming Plaintiffs' position that it is "against the law to use litter in the IRW") (Ex. 42).

¹⁰ In fact, Oklahoma's statements about whether poultry litter is an appropriate fertilizer or an inevitable pollutant are at war with themselves. As noted above, the agents of the State of Oklahoma (including Attorney General Edmondson) have repeatedly said that poultry litter is a safe and effective fertilizer when used according to the State-approved and issued litter management plans. *See Undisputed Facts* ¶17; *Attorney General of the State of Oklahoma v. Tyson Foods*, No. 08-5154, Slip Op. at 13 (10th Cir. May 13, 2009) ("the record indicates that the land-application of poultry litter is a well-established farming practice"). These litigation-driven contradictions demonstrate that Plaintiffs' interpretation of the laws at issue is incorrect.

apply litter, what training and licensing they must receive, when and where they may do so, under what conditions, and in what amounts for each individual parcel of land. *See id.* In fact, every single application of poultry litter to land in the Oklahoma portion of the IRW must be performed by a registered Grower or State-certified applicator consistent with an animal waste management plan (AWMP) or nutrient management plan (NMP) approved by agents of the State of Oklahoma.¹¹ *See* Undisputed Facts ¶19.

Rather than identify specific evidence of instances in which specific Defendants have violated specific requirements of these statutes and regulations,¹² Plaintiffs simply rely on the general prohibitions against pollution set out above. Absent evidence of specific violations of the comprehensive litter management laws and regulations, Plaintiffs' reliance on these general provisions contravenes basic canons of statutory construction and should be rejected.

First, it is well-established that “[a] specific statute will control over a conflicting general statute on the same subject.” *Russell v. Chase Inv. Servs. Corp.*, __ P.3d __, 2009 WL 983541, at *5 (Okla. Apr. 7, 2009). Indeed, “[l]egislative acts are to be construed in such manner as to

¹¹ These State-approved plans are specifically tailored to the each parcel of land and dictate the time, method, location and amount of poultry litter that may be applied. *See* Undisputed Facts ¶19; *see, e.g.*, Exs. 21-26.

¹² To the contrary, the undisputed evidence demonstrates that litter application in the IRW complies with the standards established by State law. *See* Undisputed Facts ¶¶24-29; Dkt. No. 1925 at 8 n.18 (Mar. 23, 2009); *see, e.g.*, Fisher I Dep. at 146:22-149:1 (in four years of investigation in the IRW, Plaintiffs' field investigators failed to document any violations of state litter laws) (Ex. 12); Thompson Dep. at 16:15-22:25, 31:7-23, 42:13-43:7 (Oklahoma DEQ has not found that the use of poultry litter has caused pollution to the waters of the state or violated the law) (Ex. 30); Peach Dep. at 37:15-39:4, 75:17-76:10, 90:3-12, 96:4-11, 114:14-117:7 (Oklahoma Secretary and Commissioner of Agriculture is not aware of any violation by Defendants or Growers) (Ex. 17); *id.* at 75:2-16, 95:20-96:3 (farmers in the IRW are “concerned with the environment” and “obey applicable statutes and regulations”); Fisher II Dep. at 473:15-23 (not aware of any application in violation of state-approved NMP or AWMP) (Ex. 29); P.I.T. at 2006:12-15 (not aware of any growers discharging poultry wastes into Oklahoma waters) (Ex. 1); Littlefield Dep. at 23:19-21 (no “bad actors” among farmers he inspects) (Ex.11); Phillips Dep. at 63:18-23 (not aware of growers violating waste management rules) (Ex. 33); *see also, e.g.*, Exs. 21-26.

reconcile the different provisions and render them consistent and harmonious, and give intelligent effect to each.’” *Id.* (quoting *Eason Oil Co. v. Corp. Comm’n*, 535 P.2d 283, 286 (Okla. 1975); *see also Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (“[W]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.”) (quotations, emphasis omitted). Plaintiffs’ argument that each and every application of poultry litter violates Oklahoma’s general anti-pollution laws renders meaningless Oklahoma’s more specific statutes and regulations governing—and approving—the application of poultry litter. Under these circumstances, compliance with the specific requirements must be read to satisfy the general requirements. In other words, the way farmers and ranchers know they are not (i) “caus[ing] pollution of any waters of the state,” 27A O.S. § 2-6-105(A); 2 O.S. § 2-18.1(A); or (ii) “place[ing] or cause[ing] to be placed any wastes in a location where they are likely to cause pollution,” 27A O.S. § 2-6-105(A), is by following the plans the State of Oklahoma drafted for them, which say exactly how much poultry litter is appropriate to put on each specific field.¹³

Second, it is equally well established that statutes should not be construed in a manner that renders compliance impossible, or that leads to futile or absurd results. *See Crutchfield v. Marine Power Engine Co.*, ___ P.3d ___, 2009 WL 1204493, at *6 (Okla. May 5, 2009); *In re Holt*, 932 P.2d at 1134 (declining to assume that the legislature created a statute that is impossible to comply with); *see also EEOC v. Comm’l Office Prods.*, 486 U.S. 107, 120-21 (1988); *United States v. Am. Trucking Assns.*, 310 U.S. 534, 543 (1940). Plaintiffs ask the Court to interpret the above-referenced provisions to hold that Oklahoma law is violated if any nutrients or bacteria ever escape the field on which poultry litter is placed. Plaintiffs’

¹³ Plaintiffs’ own expert could not even identify the levels of phosphorus or bacteria that would constitute “pollution” as defined by these statutes. *See Fisher II* Dep. at 459:3-461:24 (Ex. 29).

interpretation would require that soil amended by decomposed poultry litter remain in place in perpetuity, and that no phosphorous, bacteria or other constituent of poultry litter in any form may ever leave the field. However, Oklahoma officials say that this interpretation would result in an absurd impossibility.

Plaintiffs' construction has been rejected by the state agencies responsible for enforcing these statutes. Oklahoma Secretary and Commissioner of Agriculture Terry Peach has affirmed that "[p]oultry litter application in the IRW is legal when done in compliance with state law and applicable state regulations," Peach Dep. at 92:17-93:6 (Ex. 17), and derided Plaintiffs' "zero run-off" standard as impossible to meet if interpreted at the molecular level, *id.* at 140:18-142:12 ("I would say that it would be common knowledge that zero runoff is impossible"). Similarly, Steve Thompson, Director of the Oklahoma Department of Environmental Quality (DEQ), who is required by 27A O.S. § 2-6-105(B) to act upon a finding that "any of the air, land or waters of the state have been, or are being, polluted," confirms that DEQ has never found that the land application of poultry litter has polluted to the waters of the State of Oklahoma. *See* Thompson Dep. at 16:15-22:25, 31:7-23 (Ex. 30). These views deserve substantial weight in considering Plaintiffs' proposed construction of the statutes that these agencies administer. *See In re Protest of Betts Telecom Okla., Inc.*, 178 P.3d 197, 199 (Okla. Civ. App. 2008) ("[W]e ordinarily defer to the interpretation of a statute by the agency charged with its administration....").

Contrary to Plaintiffs' suggestion, a more coherent and consistent reading of these provisions holds that these general laws do not reach poultry litter applied consistent with Oklahoma's poultry litter laws, regulations and permits. Oklahoma's general environmental statutes apply to the release of a "pollutant" or "waste," 27A O.S. § 2-6-101, including "agribusiness waste discharged into waters of the state." These statutes must be read consistent

with the intent of the legislature, *Russell*, 2009 WL 983541, at *5; *In re Estate of Jackson*, 194 P.3d 1269, 1273 (Okla. 2008), which is:

to provide that no waste or pollutant be discharged into any waters of the state or otherwise placed in a location likely to affect such waters *without first being given the degree of treatment or taking such other measures as necessary to protect the legitimate beneficial uses of such waters.*

27A O.S. § 2-6-102 (emphasis added) (“Declaration of policy”). The emphasized text makes clear that these provisions are not an impossible general injunction against any constituent ever reaching the waters of the State. Rather, they require compliance with laws and regulations such as those governing poultry litter application, which represent the legislature’s best judgment as to the appropriate balance between the agricultural and economic benefits of poultry litter and sound environmental protections. As the legislature itself indicated, its poultry litter laws “assist in ensuring beneficial use of poultry waste while preventing adverse effects to the waters of the state of Oklahoma.” O.A.C. § 35:17-5-1.

Finally, if accepted, Plaintiffs’ proposed interpretation would render the provisions so vague as to deprive them of meaning in violation of the Due Process Clause of the Fourteenth Amendment. Plaintiffs’ interpretation is that Oklahoma law requires farmers and ranchers to apply litter on each field in exact compliance with litter regulations and specific state-approved plans for that field; *however*, according to Plaintiffs, farmers must also take unspecified actions to also ensure that “pollution” does not result by preventing the constituent nutrients or bacteria of that litter from escaping as it decomposes over time. As noted above, the Oklahoma officials vested with jurisdiction over these laws say that is impossible. *See supra* at 20. Accordingly, farmers cannot know what it is they are supposed to do.¹⁴ Pursuant to the void-for-vagueness doctrine, the Due Process Clause of the Fourteenth Amendment prohibits the invocation of

¹⁴ *See also supra* at 19 n.13.

penalties “where one could not reasonably understand that his contemplated conduct is proscribed.” *U.S. v. National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963); *see Connally v. General Constr. Co.*, 269 U.S. 385, 393 (1926). In *Champlin Refining Co. v. Corporation Comm. of State of Okla.*, 286 U.S. 210 (1932), the Supreme Court deemed unconstitutional a similar provision of Oklahoma law, which prohibited the production of “waste.” *Id.* at 286 U.S. 223 n.1. In analyzing the statute, the Court observed that “[t]he meaning of the word ‘waste’ necessarily depends upon many factors subject to frequent changes,” and concluded that “these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law.” *Id.* at 242-43. This same reasoning controls here. Rather than simply require compliance with the specific requirements set forth under Oklahoma’s poultry litter laws and regulations, Plaintiffs interpret the law to impose penalties on non-party farmers and ranchers for failure to comply with an undefined standard that the State itself says cannot be met. Such an interpretation is plainly unconstitutional.

B. Count 8: Oklahoma Registered Poultry Feeding Operations Act (RPFO Act)

To prevail under Count 8, Plaintiffs must demonstrate that the land application of poultry litter in the IRW: (i) constitutes a “discharge of poultry waste to waters of the state,” 2 O.S. § 10-9.7(B)(1); (ii) results in “[r]unoff of poultry waste from the application site,” O.A.C. § 35:17-5-5(a)(7)(C); (iii) “cause[s] a discharge or runoff of significant pollutants to waters of the State,” O.A.C. § 35:17-5-5(c); (iv) “cause[s] a water quality violation to waters of the State,” O.A.C. § 35:17-5-5(c); (v) “create[s] an environmental or a public health hazard,” 2 O.S. § 10-

9.7(B)(4)(a); or (vi) “result[s] in the contamination of waters of the state,” 2 O.S. § 10-

9.7(B)(4)(b).¹⁵ Plaintiffs cannot do so.

1. The Land Application of Poultry Litter Does Not Result in the “Discharge” or “Runoff” of “Poultry Waste” or “Significant Pollutants”

Claims (i) through (iii), *supra*, require evidence of a “discharge” or “runoff” of “poultry waste” or “significant pollutants.” Plaintiffs cannot establish these elements as these terms are defined under the RPFO Act and Oklahoma law.

First, the alleged conduct simply cannot constitute a “discharge of poultry waste to waters of the state” under 2 O.S. § 10-9.7(B)(1). The RPFO Act defines a “discharge” as “any release by pumping, pouring, emptying, or dumping of poultry waste *directly or through a manmade conveyance* into waters of the State.” O.A.C. § 35:17-5-2 (emphasis added). Plaintiffs have not alleged—and certainly cannot demonstrate—such a direct “discharge” into waters of the State. *See* Undisputed Facts ¶28.

Second, there is no evidence of the “[r]unoff of poultry waste from the application site.” *See* Undisputed Facts ¶29; O.A.C. § 35:17-5-5(a)(7)(C). The RPFO Act defines “[r]unoff” as any “release by leaking, escaping, seeping, or leaching of *poultry waste* into waters of the State,” O.A.C. § 35:17-5-2 (emphasis added), and defines “[p]oultry waste” in turn to include only “poultry excrement, poultry carcasses, feed wastes or any other waste associated with the confinement of poultry from a poultry feeding operation,” 2 O.S. § 10-9.1(B)(21), not the elements that make up poultry litter at the molecular level. Plaintiffs must thus establish that “poultry waste” (*i.e.* “poultry excrement, poultry carcasses,” *etc.*) have been “release[d]” into the

¹⁵ Notwithstanding Plaintiffs’ reference to these statutory claims in a single count of the SAC, each claim is separate and distinct, and therefore must be considered individually for the purposes of summary judgment.

waters of the State. But Plaintiffs’ allegations and evidence pertain solely to *nutrients* and *bacteria*—not poultry waste itself, as defined in the statute. *See* SAC ¶¶47-63.¹⁶

Third, Plaintiffs cannot establish a violation of O.A.C. § 35:17-5-5(c) (prohibiting “a discharge or runoff of significant pollutants to waters of the State”). As detailed above, the alleged conduct cannot constitute a “discharge” or “runoff” under the RPFO Act, as both terms are defined to require the release of actual “poultry waste”—not merely constituent nutrients and bacteria created by the decomposition of poultry waste. *See supra* at 23-24.

2. The Land Application of Poultry Litter In Compliance With Oklahoma Law Cannot Constitute a Violation of the RPFO Act.

The remaining provisions cited in Count 8 prohibit, by general terms, pollution of waters in the State of Oklahoma. *See* 2 O.S. § 10-9.7(B)(4)(a), (b) (“Poultry waste handling, treatment, management and removal shall ... (b) not result in the contamination of waters of the state.”); O.A.C. § 35:17-5-5(c) (“Storage and land application of poultry waste shall not ... cause a water quality violation to waters of the State.”). As detailed *supra* with respect to Count 7, general injunctions against pollution of the waters of the state cannot overcome the numerous specific regulations governing the precise amount(s), location(s), and timing of poultry litter application. *See supra* at 17-22. For these same reasons, Plaintiffs’ generalized allegations cannot establish a violation of the statutes at issue in Count 8.

V. PLAINTIFFS HAVE FAILED TO IDENTIFY ANY SPECIFIC RECORD EVIDENCE TO DEMONSTRATE THAT EACH DEFENDANT VIOLATED THE STATE STATUTORY CLAIMS

Finally, even if Plaintiffs could satisfy the required elements of each statutory claim as a

¹⁶ The only evidence Plaintiffs have ever presented on this point was Lowell Caneday’s recollection at the preliminary injunction hearing of having once seen poultry litter physically moving across a road. *See* P.I.T. 598:19-599:24, 601:9-602:2 (Ex. 1). Of course, Professor Caneday did not demonstrate where this poultry litter was coming from, where it went, who applied it, or to whom it belonged. *See id.*

matter of law, Counts 7 and 8 must still be dismissed because Plaintiffs have not identified record evidence of any specific violations of the statutes in question. *See Undisputed Facts* ¶¶24-29. At the summary judgment stage, Plaintiffs may no longer rest upon mere allegations, and instead must identify specific admissible evidence of each alleged violation of the state statutory provisions and administrative rules. *See Seaboard Farms*, 387 F.3d at 1169 (“the non-movant may not rest on its pleadings but must set forth specific facts showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof”). Yet, Plaintiffs have steadfastly refused to provide the requisite details underlying Plaintiffs’ claims, including, but not limited to, the date, location, amounts and responsible person(s) for each application of poultry litter in the Oklahoma-portion of the IRW that is alleged to violate each individual statutory provision and administrative rule at issue. *See Undisputed Facts* ¶27. Plaintiffs’ failure is particularly significant with respect to the state statutory claims at issue here, in light of the fact that the provisions and rules regulate, and correspondingly penalize, each individual violation thereof. *See* 27A O.S. § 2-3-504; 2 O.S. § 2-16; 2 O.S. § 10-9.11; 2 O.S. § 20-62. As a result, Plaintiffs cannot rely merely upon generalized evidence of violations throughout the entire IRW, but are rather required to provide evidence of each violation. Moreover, such reliance on generalized allegations that the molecular components of poultry litter move downstream would be futile given that, unlike Plaintiffs’ other claims, the state statutory counts pertain *only* to conduct in Oklahoma. *See supra* at 11. Because Plaintiffs have not identified specific evidence of each alleged violation set forth in Counts 7 and 8, the claims must be dismissed.

CONCLUSION

For the foregoing reasons, summary judgment is appropriate, in whole or in part, to dismiss Plaintiffs’ state statutory claims in Counts 7 and 8.

Respectfully submitted,

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